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No. 84-281

In the Supreme Court of the United States

OCTOBER TERM, 1984

SCHULIST FARMS, INC., SCHULIST ENTERPRISES, THOMAS H. SCHULIST, ROSALIE SCHULIST, DAVID A. SCHULIST, MURIEL SCHULIST and PAUL F. SCHULIST,

Petitioners,

vs.

ITT CONSUMER FINANCE CORPORATON, AETNA FINANCE COMPANY (THORP FINANCE CORPORATION), WHYTE & HIRSCHBOECK, S.C., and EDWARD J. HEISER, JR.,

Respondents.

On Petition for Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF IN OPPOSITION TO PETITION

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QUESTION PRESENTED

Whether the court of appeals correctly decided that the plaintiffs' second amended complaint did not state a claim for relief under 42 U.S.C. §1983 because it failed to allege any conduct that could be characterized as "state action" or which occurred "under color of state law"?

STATEMENT REQUIRED BY RULE 28.1

Respondent Whyte & Hirschboeck, S.C., is a service corporation incorporated under Wisconsin law. It has no parent, subsidiary, or affiliate companies.

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STATEMENT OF THE CASE

The Proceedings Below

This action was originally brought in the Western District of Wisconsin as a diversity action for fraud and abuse of process. That complaint was dismissed for lack of jurisdiction because the Schulists[1] are all residents of Wisconsin and two of the defendants-respondents, Whyte & Hirschboeck, S.C. (hereafter "W&H") and Edward J. Heiser, Jr. (hereinafter "Heiser"), are also Wisconsin residents.

[1] In this brief, all seven of the plaintiffs-petitioners will be referred to collectively as "the Schulists."

The Schulists then filed an amended complaint in which they attempted to establish jurisdiction by asserting a federal claim. To that end they added a one paragraph "Third Cause of Action" to their original complaint. The new paragraph simply incorporated the allegations of the two original claims, and made the conclusory allegation that the defendants "jointly and severally, acting under color of law, did wrongfully deprive the plaintiffs of their rights and property and privileges secured by the constitution and laws under 42 U.S.C. Sec. 1983."

The district court granted defendants' motions to dismiss the amended complaint for lack of subject matter jurisdiction. The Schulists requested a reconsideration of that dismissal and the court granted a hearing. Just prior to the hearing, the Schulists sought leave to amend their complaint a second time, to add, as paragraph 28 of their Third Claim for Relief, an allegation that the defendants "willfully acted jointly" with the Circuit Court for Portage County (the Wisconsin trial court) to deprive the Schulists of their property without due process of law. The alleged due process violation was that the defendants had obtained summary judgment against the Schulists in the Circuit Court for Portage County.

Following a hearing, the district court vacated its earlier judgment dismissing the amended complaint, allowed the Schulists to amend their complaint a second time, and then granted the defendants' motions to dismiss the second amended complaint for failure to state a claim and lack of subject matter jurisdiction.

The Schulists appealed the decision of the district court to the Seventh Circuit Court of Appeals. In an unpublished decision dated May 23, 1984, the Seventh Circuit affirmed the district court's dismissal of the action (Pet. Br., pp. 2a-11a).

Facts[2]

In June of 1979, Aetna Finance Company (d/b/a Thorp Finance Corporation) (hereinafter "Thorp") loaned $250,000.00 to the Schulists. The loan was secured by mortgages on two parcels of land and certain personal property. W&H and Heiser drafted the loan documents and represented Thorp at the closing. When the loan was not paid, Thorp sued to foreclose its mortgages. Pursuant to those foreclosure proceedings, the Schulists' personal property and real estate was sold in October of 1980. At the time of the real estate foreclosure sale the Schulists had not harvested a portion of their potato crop, which rotted in the field.

The Schulists appealed the foreclosure judgment to the Wisconsin Court of Appeals, which reversed the confirmation of sale. While that appeal was pending, the Schulists brought a separate state court action against ITT Consumer Financial Corporation and Thorp for improperly foreclosing and selling the farm and personal property, and for loss of the 1980 potato crop. That action for damages was consolidated with the remanded foreclosure action in the Circuit Court for Portage County.

The parties settled some of the claims pending in the consolidated case. Thorp moved for summary judgment on the Schulists' remaining claims, and the trial court

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[2] Since this is a review of a decision granting a motion to dismiss, the "facts" which are deemed to exist are those well pleaded factual allegations in the Schulists' Second Amended Complaint. W&H and Heiser dispute many of the so-called "facts" alleged by the Schulists. However, for purposes of this petition, those factual allegations control, and are assumed.

granted that motion. The Schulists appealed that summary judgment to the Wisconsin Court of Appeals which affirmed the trial court's grant of summary judgment to Thorp, *Schulist Farms, Inc., et al.* v. *ITT Consumer Financial Corp.*, 115 Wis. 2d 695, 339 N.W.2d 366 (Wis. App. 1983); petition for review denied, 115 Wis. 2d 705 (1983). On January 25, 1983, while that appeal was still pending in the state appellate court, the Schulists brought this action in federal court to, in effect, challenge the state court's grant of summary judgment.

In their federal action the Schulists alleged that their state court complaint for damages recited that the loan from Thorp was secured by growing crops, that W&H and Heiser, acting as Thorp's attorneys, admitted that the loan was so secured in their state court answer, but that Thorp nonetheless moved for summary judgment on the grounds that the loan was not secured by growing crops. That motion was supported by an affidavit from Thorp's local manager denying that the loan was secured by growing crops. The Schulists allege that this affidavit contradicted the manager's earlier deposition testimony. The Schulists filed counter-affidavits opposing the summary judgment motion. The state circuit court judge granted the motion.

The Schulists' federal court complaint contends that the alleged change of position in denying that the loan was secured by growing crops, and W&H and Heiser's alleged conflict of interest as attorneys (the Schulists' claim they gave legal advice to both sides at the loan closing in 1979) constituted fraud (first cause of action), abuse of process (second cause of action) and a violation of the constitution or the laws of the United States (third cause of action).

SUMMARY OF ARGUMENT

The petition for certiorari should be denied because this case does not present any of the considerations which would lead this Court to grant discretionary review. The rulings by the District Court and the Court of Appeals dismissing the Schulists' claim for lack of federal jurisdiction are correct, are not in conflict with the decisions of any circuit court of appeals, and do not depart from the usual course of judicial proceedings so as to require supervision by this Court. The case presents no important question of federal law which has not, but should be, settled by this Court, nor does the decision of the Court of Appeals conflict with the decisions of this Court.

The case involves nothing more than state-law tort claims which the Schulists tried to bootstrap into a federal claim after learning that their claimed diversity jurisdiction did not exist. As the Court of Appeals ruled, the Schulists have stated no claim for relief under 42 U.S.C. §1983. At most, they claim error by the state court, a claim which they could, and did, pursue in the state appellate system.

ARGUMENT

I. THE PETITION SHOULD BE DENIED BECAUSE THE DECISION OF THE COURT OF APPEALS WAS CLEARLY CORRECT

The issue in this case is whether the Schulists' complaint, amended twice after they discovered they could not claim diversity jurisdiction, states a claim for relief under §1983 so as to confer jurisdiction on the federal court. The Seventh Circuit correctly decided it did not.

To state a claim under §1983 a complaint must allege facts that show both:

1. That defendants have deprived plaintiffs of a right, privilege, or immunity secured by the constitution or laws of the United States; and

2. That defendants acted under color of state law or authority.

Flagg Brothers, Inc. v. *Brooks,* 436 U.S. 149, 155 (1978). The Schulists complain that the defendants deprived them of their property without due process of law in violation of the Fourteenth Amendment. The Fourteenth Amendment is only violated by "state action." In this instance the requirement of "state action" needed to establish a violation of plaintiffs' constitutional rights and the requirement that the defendants acted "under color of state law" are identical. *Lugar* v. *Edmonson Oil Co., Inc.,* 457 U.S. 922, 935 (1982).

The acts of a private party (such as defendants herein) can only be considered "state action" (or action "under color of state law") if two conditions are satisfied. First, the complained of constitutional injury to the plaintiffs must be caused by the exercise of some right or privilege

created by the state or by a rule of conduct imposed by the state. Second, the defendants charged with the deprivation or violation of plaintiffs' constitutional rights must be fairly said to be state actors, because they are state officials, because they have acted together with or have obtained sufficient aid from state officials, or because their conduct is in some other way chargeable to the state. *Lugar* v. *Edmonson Oil Co., Inc., supra,* 457 U.S. at 937. Mere invocation of state legal procedures is not "joint participation" or "conspiracy" with state officials which constitutes "action under color of state law." *Id.* at 939, n.21.

The respondent attorneys here did nothing more than represent a private party in state court litigation. This Court has already determined that an attorney's successful participation in private, state court litigation does not itself render that attorney a "state actor" for purposes of §1983. In *Dennis* v. *Sparks,* 449 U.S. 24 (1980), the court held that a cause of action under §1983 was stated only where it was alleged that private attorneys had gone beyond merely representing their client and had instead conspired with and bribed a state court judge into issuing an unlawful injunction. Those private attorneys had become willful participants in joint action with the state or its agents. *Id.* at 27. However, the court made it clear that for an attorney to be a "willful participant in joint action" meant something more than simply successfully representing a client in state court litigation. The court stated:

> Of course, merely resorting to the courts and being on the winning side of a lawsuit does not make a party a co-conspirator or a joint actor with the judge. But, here, the allegations were that an official act of the defendant judge was the product of a corrupt conspiracy involving bribery of the judge. Under these

> allegations, the private parties conspiring with the judge were acting under color of state law; . . . .

Id. at 28.

Here, in contrast to *Dennis,* there are no facts alleged that support the Schulists' conclusory allegation that the defendants acted "jointly" with the state trial judge to misuse the summary judgment proceeding. Despite two amendments, the Schulists have failed to allege any facts demonstrating that the judge was implicated in a joint act with the defendants to pervert the summary judgment proceeding. There is no claim of bribery. There is no claim the state court lacked jurisdiction. There is no claim of improper influence. All the Schulists have alleged is that the judge ruled on a motion for summary judgment, as was his duty. The attorney defendants, W&H and Heiser, are alleged to have done nothing in state court other than successfully bring that motion. The Schulists claim error in granting that motion (a claim which has been rejected by the Wisconsin appellate courts), but mere error is not enough to violate §1983.

Not only do the Schulists fail to allege the requisite state action, but they also fail to properly allege any constitutional violation. Paragraph 28 of the second amended complaint sets forth three alleged violations of due process:

1. The state court exceeded or abused its authority by granting summary judgment where allegedly a disputed issue of fact existed;

2. The state court allowed W&H and Heiser to act as attorneys for Thorp, despite an alleged conflict of interest; and

3. Granting summary judgment denied plaintiffs their right to a jury trial.

The claim that the state court judge exceeded his authority by granting summary judgment is nothing more

than a claim of error in a state court proceeding. This does not state a claim cognizable under §1983, as the courts of the various circuits unanimously hold. *See, e.g., Brown* v. *Dunne,* 409 F.2d 341 (7th Cir. 1969); *Bottone* v. *Lindsley,* 170 F.2d 705, 707 (10th Cir. 1948), *cert. denied,* 336 U.S. 944 (1949). The Schulists had the opportunity to appeal the alleged error to the state appellate courts of Wisconsin. The Schulists availed themselves of that opportunity. On appeal, the trial court's grant of summary judgment was affirmed. *Schulist Farms, Inc.* v. *ITT Consumer Financial Corp., et al.,* 115 Wis. 2d 695, 339 N.W.2d 366 (Wis. App. 1983), petition for review denied, 115 Wis. 2d 705 (1983). The Schulists have no right under the constitution or laws of the United States to again appeal that decision to the federal courts.

The Schulists' next allegation is that allowing W&H and Heiser to represent Thorp in the state court constituted an improper conflict of interest. Even if this were true, it amounts only to a claim of error in the state court proceeding. There is no allegation that the state court judge and the defendants conspired together to obtain the summary judgment. The failure to allege this conspiracy prevents the complaint from stating a claim under §1983. (See *Brown* v. *Chaffee,* 612 F.2d 497 (10th Cir. 1979), holding that even if attorneys had a conflict of interest, their actions were not "under color of law" and were not subject to a claim under §1983.)

Finally, the Schulists' allegation that they were wrongfully deprived of their right to a jury trial does not state a claim under §1983. The Schulists make no facial attack on the validity of the Wisconsin summary judgment statute. Rather, the Schulists' argument is based on the misconception that their due process rights in this case could only have been satisfied by a jury trial. That position is patently invalid, since due process is a flexible concept that

calls for differing procedural protections in different situations. *Mathews* v. *Elridge,* 424 U.S. 319, 333-34, 339-40, 349 (1976). In cases in which there are no issues of material fact, summary judgment is all the "hearing" that due process requires, and the grant of summary judgment does not violate a party's right to a jury trial. *Shore* v. *Park Lane Hosiery Co., Inc.,* 565 F.2d 815 (2d Cir. 1977), *aff'd,* 439 U.S. 322 (1979); *United States* v. *Arizona Fuels Corp.,* 681 F.2d 797, 799 (Temporary Emergency Court of Appeals, 1982); *Oglesby* v. *Terminal Transport Co., Inc.,* 543 F.2d 1111, 1113 (5th Cir. 1976); Wright, Miller & Kane, *Federal Practice and Procedure,* Civil 2d, §2714 (1983).

Accordingly, the Schulists' second amended complaint was properly dismissed.

II. THE PETITION DOES NOT DEMONSTRATE ANY REASON WHY THIS COURT SHOULD GRANT DISCRETIONARY REVIEW

The Schulists' petition fails to demonstrate any of the criteria set forth in Supreme Court Rule 17 governing review on certiorari.

The Schulists do not claim that the Seventh Circuit's decision conflicts with the decision of another federal court of appeals on the same matter. Indeed, the circuits are unanimous that on these facts, the activities of a private attorney in state court litigation do not constitute "state action" or "action under color of state law." *Hansen* v. *Alhgrimm,* 520 F.2d 768, 770 (7th Cir. 1975); *Harley* v. *Oliver,* 539 F.2d 1143, 1145-46 (8th Cir. 1976); *Lindley* v. *Amoco Production Co.,* 639 F.2d 671, 673 (10th Cir. 1981); *Cooper* v. *Wilson,* 309 F.2d 153 (6th Cir. 1962). Nor does the petition show that the Seventh Circuit's decision conflicts with a decision of a state court of last resort, or has so far departed from the usual course of judicial proceed-

ings (or sanctioned such a departure by a lower court) as to call for an exercise of this Court's power of supervision.

Likewise, the petition does not demonstrate that the Seventh Circuit's opinion decided any important question of federal law which has not been, but should be, settled by this Court. In fact, the opinion in *Dennis* v. *Sparks, supra,* 449 U.S. at 24, controls this case and compels dismissal of the Schulists' complaint. Thus, the petition does not and cannot demonstrate how the Seventh Circuit's decision in any way conflicts with the applicable decisions of this Court. It follows that the petition should be denied.

CONCLUSION

The Schulists have attempted to bring a state court tort action in federal court by invoking 42 U.S.C. §1983. Their complaint fails to allege facts demonstrating that they were deprived of property through state action, or that the defendants herein could be said to have acted "under color of state law" because they conducted private litigation in the state courts of Wisconsin. Accordingly, the petition for a writ of certiorari should be denied.

Dated this 14 day of September, 1984, at Milwaukee, Wisconsin.

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